Supreme Court, U. S.
FILED
AUG 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975

No. 75-245

DAY AND ZIMMERMANN, INC.,
Petitioner,

versus

HAWLEY K. CHALLONER, DAVID E. NELMS, INDIVIDUALLY and AS ADMINISTRATOR OF THE ESTATE OF DANIEL E. NELMS, and MARY EDNA NELMS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Norman C. Russell
ATCHLEY, RUSSELL, WALDROP
& HLAVINKA
803 Spruce Street
P. O. Box 1049
Texarkana, Texas 75501

Attorneys for Petitioner

SCOFIELDS' QUALITY PRINTERS P O BOX 53096 N O LA 70153 504 822 1611

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED 2

QUESTION PRESENTED I 2

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

QUESTION PRESENTED II 13

CONCLUSION 18

CERTIFICATE OF SERVICE 18

APPENDIX TO THE PETITION

Judgment 1a

Court's Opinion 2a

Petition on Rehearing 19a

Orders on Mandate 20a

INDEX OF AUTHORITIES

Cases:

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 11

Barbee v. Rogers, 425 S.W.2d 342 (Tex.Sup. 1968) 18

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 2,5,6, 7,9,11,12

Escola v. Coca Cola Bottling Company, 24 Cal.2d 2453, 150 P.2d 436 (1944) 13

INDEX OF AUTHORITIES (Continued)

Page

Freitas v. Twin City Fisherman's Cooperative Association, 452 S.W.2d 931 (Tex. Civ.App. — Austin, 1970 writ ref'd n.r.e.) 18

Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 27 Cal.Reptr. 697, 377 P.2d 897 (1963) 13

Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841, 849 (1967) 13

Howard v. Lyons, 360 U.S. 593 (1959) 11,12

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) 2,5,6,7,8,9,12

Lester v. Aetna Life Ins. Co., 433 F.2d 884 (5th Cir. 1970) cert. denied, 402 U.S. 909 (1971) 8

Littlehale v. E. I. DuPont de Nemours & Co., 380 F.2d 274 16

McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex.Sup. 1967) 17

Messick v. General Motors Corporation, 460 F.2d 485 (5th Cir. 1972) 17

Santor v. A and M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) 13

Shamrock Fuel and Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex.Sup. 1967) 17

Shivers v. Good Shepard Hospital, Inc., 427 S.W.2d 104 (Tex.Civ.App. — Tyler, 1968, writ ref'd, n.r.e.) 18

Swift v. Tyson, 16 Pet. 1 (1842) 2,6,9

INDEX OF AUTHORITIES (Continued)

Page

Constitutions, Statutes and Rules

28 U.S.C.A. 1254(1) 2

28 U.S.C.A. 1346 3

38 U.S.C.A. Section 301, *et seq.* 16

38 U.S.C.A. Section 401, *et seq.* 16

Law Reviews, Treatises and Legal Encyclopedias

Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 Law and Contemp. Prob. 722, 742 (1963) 10

R. Leflar, *American Conflict of Laws*, 151 (1968) 10

Restatement of Law of Torts, Second Edition, Section 402A 13

Annot., 38 A.L.R.3d 1247 (1971) 13

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

DAY AND ZIMMERMANN, INC.,
Petitioner,

versus

HAWLEY K. CHALLONER, DAVID E. NELMS,
INDIVIDUALLY and AS ADMINISTRATOR
OF THE ESTATE OF DANIEL E. NELMS,
and MARY EDNA NELMS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on April 24, 1975, with Petition for Rehearing denied June 2, 1975.

OPINIONS BELOW

The District Court for the Eastern District of Texas, Texarkana Division, rendered no opinion. The opinion of the Court of Appeals for the Fifth Circuit was

rendered April 24, 1975, and is reported at 512 F.2d 77 (1975).

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) Review is sought of the judgment of the Court of Appeals for the Fifth Circuit entered on April 24, 1975 (copy thereof is appended to this Petition at pages 1a-2a). The Court's opinion bearing the same date is appended to this Petition at pages 2a-18a.

(ii) The order of the Court of Appeals denying Petition for Rehearing is dated June 2, 1975. Issuance of mandate has been stayed by orders dated June 17, 1975 and July 21, 1975. Such instruments are appended to this Petition at pages 19a, 20a, and 21a, respectively.

(iii) 28 U.S.C.A. 1254(1) confers on this Court jurisdiction to review the judgment in question by Writ of Certiorari.

THE QUESTION PRESENTED I.

Whether The Lower Court In A Diversity Case Can Negate *Klaxon V. Stentor* And Apply Its Own "Choice Of Law" Rule Instead Of A State Conflicts Rule, Thereby Recreating A Body Of Federal Common Law In The Area Of Conflicts, As Would Have Been Permitted Under *Swift V. Tyson*, But Prohibited By *Erie Railroad Company V. Tompkins*.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

No constitutional provisions, statutes or rules are directly involved in this Petition, but there is indirectly involved 28 USCA 1346 (Federal Tort Claims Act), engrafting the only exception to the United States Government's immunity from action against it for its wrongs.

STATEMENT OF THE CASE

Respondents (Plaintiffs below) were servicemen and members of a 105-mm Howitzer gun crew in Cambodia on May 22, 1970, when, in the course of a fire mission, a shell prematurely exploded in the barrel of the canon. Nelms (of Tennessee) was instantly killed and Challoner (of Wisconsin) was injured. Challoner sought damages for injuries and disabilities. Nelms' parents sued for the wrongful death of their son. Day and Zimmermann was the only remaining Defendant when the case was presented to the jury (all other defendant suppliers of ammunition components having been dismissed). The cause was tried in the Eastern District of Texas, Texarkana Division on the theory of absolute or strict liability. The only basis of federal jurisdiction was diversity of citizenship. A verdict of $200,000.00 was returned for Challoner and $40,000.00 for Nelms. Petitioner appealed, and the Fifth Circuit affirmed.

Lone Star Army Ammunition plant is a wholly owned and controlled United States Army ordnance plant. It is characterized as a GOCO (Government owned-

contractor operated) facility. The sole plant function was to load, assemble, and pack (as distinguished from manufacture) ammunition from materials purchased and owned exclusively by the United States Government. The assembly was required to conform strictly with plans, procedures, processes, and specifications of the Government. In this instance, Petitioner, Day and Zimmermann, Inc., was the contract operator of the plant, and the Government stationed inspectors in ample numbers to see that the contractor strictly complied with Government standards. The United States shipped the finished ammunition on its bill of lading and it solely placed the ammunition into the stream of commerce. There was no sale by Petitioner to the United States of any product, and it never had any right of ownership in the ammunition.

Among the ordnance ammunition items assembled by the Petitioner was a 105-mm Howitzer "shell", which consisted of (a) a brass propellant loaded shell case and (b) a hollow projectile ("the bullet") filled with an explosive adjusted to explode at target.

In this instance (so it is claimed) the exploding powder in the shell case started the projectile in flight but, due to a defect, it exploded before it passed through the barrel of the cannon. This explosion killed Daniel E. Nelms and injured Hawley K. Challoner, servicemen, in the crew of that artillery unit.

After the Government discharged its respective statutory liabilities for the death and injury, this suit was filed against Petitioner directly[1] for damages

1 and indirectly against the Government. Under Petitioner's contract, payment of the judgment is reimbursable by the Government.

above and beyond what the Government assumes when it accepts a person into the military service for combat duty.

The case was tried solely upon the doctrine of strict liability in tort. Petitioner sought to have the Court apply the substantive law of Cambodia, but the law of Texas was held to control except with respect to the choice-of-law issue itself. Cambodia imposes liability only upon the basis of fault and does not recognize strict liability in tort. Texas has adopted the doctrine of strict liability in tort. The Texas choice of law rule followed by its Supreme Court is that of lex loci delicti and under such, if applied, Cambodian substantive law would have governed. The Fifth Circuit applied the substantive law of Texas on the issue of liability but refused to follow *Erie* and *Klaxon* and selected its own choice-of-law rule, thereby recreating a body of Federal common law in choice of law.

REASONS FOR GRANTING THE WRIT

The Court Below is Recreating a Body of Federal Common Law of Choice of Law

A decisive determination should be made by this Court as to whether it will allow the Fifth Circuit to erode away *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), by permitting it to continue building a Federal common law of choice of law. This Court in *Klaxon*, following *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), clearly required that "The conflict of laws rules to be applied by the Federal Court . . . must conform to those prevailing in . . . state courts." The Fifth Circuit in its opinion recognizes that if *Erie* and *Klaxon* are

followed "This would mean that, applying Texas choice of law rules, . . . the substantive law of Cambodia would apply". However, the Circuit refused to follow these decisions, saying: ". . . we hold to the contrary."

There are varying "modern approaches" in the field of conflict of laws. *Klaxon*, as written, tended to deter federal courts from choosing at will some approach having appeal to that particular court. Gradually the lower federal courts have felt a freedom in conflict of laws to relax from following the rule of the forum state. Through deviating from *Klaxon* a body of Federal common law of conflict of laws is arising, especially in the Fifth Circuit. This is an open reversion to *Swift v. Tyson*, 16 Pet. 1 (1842). Texas has not elected to abandon the place-of-injury rule in determining choice of law in tort cases. Such rule, of course, would require application of Cambodian law which would deny recovery in this case as it does not recognize strict liability in tort — the only theory on which the case was tried. The Fifth Circuit, by choosing its own choice of law rule and in refusing to follow the forum state conflict rules in this diversity case, has held directly contrary to *Klaxon* and *Erie*. The judgment should be reversed, or, alternatively, this Court should reexamine the Fifth Circuit's common practice of departure from *Erie* and elect whether it will permit a return to *Swift v. Tyson*.

Some three years following *Erie Railroad*, this Court in *Klaxon* determined that the conflict-of-laws rules to govern in a case based on diversity of citizenship jurisdiction were those of the state in

which the federal court is sitting. This Court stated: "We are of opinion that the prohibition declared in *Erie Railroad v. Tompkins* . . . against such independent determinations by the federal courts extends to the field of conflict of laws." 313 U.S. at 496. The court below admitted that Texas, following the place of injury choice of law rule in a tort situation, would apply Cambodian substantive law as to wrongful death and also would "perhaps" apply such conflict of laws rule to the personal injury aspects of the case. Thus, if this tort case had been decided in the state courts, the outcome would have been the opposite at least in part. Nevertheless, the court refused to follow *Erie* and *Klaxon*. It found the case governed not by Texas conflict of laws rules, which would have called for an application of Cambodian law, but by the Texas substantive law of strict liability.

Ironically, the Court below applied Texas law on every other point in dispute — whether the doctrine of strict liability in tort should be applied to non-sellers. Whether Petitioner is liable despite the fact that it scrupulously followed the very design and specifications required by the United States, and whether there is a right of action for wrongful death. On the last point, the court admitted that the question was doubtful, but went on to hold for plaintiff on the theory that "the Supreme Court of Texas, if it had this appeal, would hold that conventional notions of extra-territoriality do not encompass the peculiar situation we have here and would further hold that the Texas Legislature had in mind no such extra-territorial limitation when it enacted the Wrongful Death Statute." No such divination would have been required to apply the Texas Supreme Court's conflicts

rule. Yet, the court below refused to apply the whole law of Texas, the forum state, and instead applied only that portion of it with which it agreed, the portion, as it happened, that favored each of the positions taken by the plaintiff.

The Court of Appeals' approving reference in footnote 1 of its opinion, *infra* p. 5217, to "the case against *Klaxon*" makes it plain the real basis of its refusal to follow the whole law of Texas was a deep-seated hostility to the controlling precedents laid down by this Court. Indeed, the court below was simply following the anti-*Klaxon* line it had previously taken in *Lester v. Aetna Life Ins. Co.*, 433 F. 2d 884 (5th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971), a case without any international implications whatever. Cambodia, it said, had "no interest" in the case, "no policy at stake," like Wisconsin in *Lester*, an insurance case. Therefore the conflicts rule of the forum — which would have concededly have applied the Cambodian substantive law despite the "no interest" theory — would be disregarded.

It may be observed, in passing, that Texas indisputably has an "interest" in the case, and that the Texas courts would have applied the law of the place of injury. There is no reason why this policy determination (whatever one may think of it in theory) should have been disregarded. That Texas chooses to follow a more traditional conflicts approach, as opposed to the newer, more academically oriented "governmental interests" analysis, is basically its own business. The Court of Appeals' rejection of this approach was based upon reasons irrelevant to the

policies of federalism that underlie *Erie* and *Klaxon*. Perhaps some day in the future these reasons might lead the Supreme Court of Texas to abjure the gospel according to Beale and start weighing "interests." But until that day comes, the decision below creates the very intrastate disuniformity, and encourages the very forum-shopping, that *Erie* and *Klaxon* were meant to exclude.

This Court in *Erie* said:

> *Swift v. Tyson* introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten "general rule" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state. *Erie R. Co. v. Tompkins*, 304 U.S. at 74.

Thus in the case at hand the creation of a federal common law of conflicts will make the rights vary according to whether suit is brought in state or federal court and will thus bring into being an unequal administration of justice. Ostensibly if suit is brought in a Texas state court a law of place of injury will govern in a tort situation. If brought in a federal court the court will apply an interest analysis rule. If it is of the opinion

after consideration of interests and policies that the law chosen is that of a jurisdiction having no interest in the contest, the federal court then refuses to apply such choice of law rule and reaches a result not in accord with the conflicts rule of the state.

Intrastate forum shopping will also of a certainty be promoted, and the outcome of a lawsuit within a state, if conditions of diversity jurisdiction are present, will come to depend upon the choice of a federal or state forum. Professor Cavers criticized a choice of law process which permits such forum shopping. Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 Law and Contemp. Prob. 722, 742 (1963). Professor Leflar has declared dramatically and succinctly:

> If the aim of avoiding forum-shopping between state and federal courts is to be achieved in choice-of-law cases, the *Klaxon* rule will have to be retained. R. Leflar, *American Conflict of Laws* 151 (1968).

It should be remembered that a state enjoys under our constitutional scheme of things, and subject to the Constitution, a certain autonomy with respect to applicable law, including choice of law. Thus it should be enabled to fix its own law, as well as the policy as to the application of that law. Moreover, it should be allowed, within its policy-making considerations, to say whether or not it will adhere to traditional conflict of laws rules or depart therefrom in favor of policy or interest-oriented principles.

The Court of Appeals in buttressing its argument in opposition to the application of the Texas conflict-of-laws rule mentions in footnote three, (*infra* p. 9a) that this Court has not required that every diversity case needs to be governed in all aspects by state law. It then cites two cases as its authority.[2] With all due respect, these cases are not pertinent to the case at hand. They concern what Judge Friendly has called a "specialized federal common law" to which all courts — state and federal — must conform. The *Erie* doctrine is applicable only to claims grounded on state law, like the tort claims involved here, arising within the diversity jurisdiction of the federal courts. When the litigation is based upon some other ground of federal jurisdiction or is concerned with rights created or protected by federal law, the *Erie* case is inapplicable.

In *Banco Nacional de Cuba* the Supreme Court had before it a claim which was founded upon a Cuban decree expropriating certain property. The question presented was whether the act-of-state doctrine would sustain such claim. *Howard v. Lyons* was another case of a "specialized federal common law" to be adjudicated according to federal standards. The question was whether the federal courts were bound to follow state law as to the extent of privilege which a naval officer may claim as to civil liability for defamatory statements.

The facts of this case do not warrant any conclusion that federally created or protected rights embodied in federal law or policy are involved. It is true that death and injury occurred in Cambodia. But the Cambodian

---

2 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), and *Howard v. Lyons*, 360 U.S. 593 (1959).

government was in no way implicated. It was merely a suit by an American citizen against an American company. International relations of the United States are not in issue nor are they affected. *Howard v. Lyons* involved a member of the military as does this case, but there any similarity ends. In the former case a privilege from civil liability in a situation of defamation if granted would be designed to "promote the effective functioning of the Federal Government." Suit by a soldier for tort against an American company would appear to have no relationship to such effective functioning and would not be grounded in a federal source.

Finally, the court below attempted to ground its refusal to apply the law of Cambodia upon the "very nature" of the court. It stated tersely:

> We are a Court of the United States, an instrumentality created to effectuate the laws and policies of the United States. We conclude that in this case we have no warrant, legal or moral, to frustrate well established American policies by an application of the local policies of a foreign government. *Infra*, p. 11a.

There is no doubt that both federal and state courts are "created to effectuate the laws and policies of the United States." No quarrel can be had with this statement, and in fact it supports Petitioner's position here. For in reality the court below frustrated American policies, to-wit: the Constitution of the United States as interpreted by this Court of the United States in *Erie* and *Klaxon*, the policy in favor of intrastate uniformity of law in cases brought to enforce state-created rights of action, and the policy of the State of Texas which favors applying the law of the place of injury.

QUESTION PRESENTED II.

Whether The Doctrine Of Strict Liability In Tort Shall Be Further Extended To Include Liability For Death Or Injuries To Servicemen In Wartime Combat When Such Is Alleged To Result From Defective Ammunition Products Loaded By An Independent Contractor Using Government Owned Ammunition Components And Plans And Such Ammunition Is Loaded Pursuant To U. S. Government Specification And Supervision.

A. The policy considerations underlying the doctrine of strict liability in tort are not applicable to independent munitions contractors of the United States Government in actions by members of the Armed Forces who are killed or sustain personal injuries under in-combat, wartime conditions.

The question of whether the doctrine of strict liability in tort should be applicable in the instant case is apparently one of first impression. See Annot., 38 A.L.R.3d 1247 (1971). The policy considerations which gave rise to the doctrine are inapplicable in this case.[3]

---

3 Policies appear in *Escola v. Coca-Cola Bottling Company*, 24 Cal.2d 453, 150 P.2d 436 (1944); *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963); *Santor v. A and M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965); the Comment following Section 402A of the Restatement of the Law of Torts, Second Edition; and *Helene Curtis Industries, Inc. v. Pruitt*, 385 F.2d 841, 849 (1967).

Policy considerations often stated are:

1. *Imposing strict liability in tort upon manufacturers will induce them to become more careful.*

This public policy consideration has no relevancy when applied to a "GOCO" (Government owned-contractor operated) facility; these munitions were not "over-the-counter" products. Day and Zimmermann must follow the Government designs and regulations in every phase of its assembly, storage, and inspection procedures. It has no latitude in the choice of materials or the method of assembly.

2. *Modern Marketing techniques create a reliance among the general public that the product will meet their expectations.*

Day and Zimmermann does not market products to the general public nor does it use "modern" marketing techniques.

3 *Manufacturers and other sellers of products who place the same in the "stream of commerce" thereby accept a special duty to the general public.*

Day and Zimmermann does not place its products in the stream of commerce. The United States does so. None of its products are available to the general public first, because private ownership of munitions by United States citizens is illegal and secondly, because the products are not owned by Day and Zimmermann and, consequently, Day and Zimmermann is not in a position to sell them to anyone.

4. *Consumers do not have the capacity or the opportunity to discover defects.*

In the "typical" products case, the consumer has not the means or knowledge to inspect for defects. This is done by Government employed and salaried inspectors whose sole function is to insure that Day and Zimmermann follows the proper load, pack, assembly and Government imposed inspection procedures. These Government inspectors are part of the Quality Assurance Department and function, in effect, as watchdogs or inspectors of the Day and Zimmermann employees and Day and Zimmermann inspectors.

5. *The general public would have difficult proof problems in pointing to a specific act of negligence by the manufacturer-seller.*

Here, negligence was not a basis of recovery — only strict liability.

6. *Modern advertising techniques by manufacturers and other sellers create an unquestioning reliance among the public that the product will meet the standards as advertised.*

This policy consideration has no applicability to the instant case. Day and Zimmermann does no advertising to the public.

7. *It is better to put the loss on the manufacturer rather than the individual because the manufacturer can spread the loss through the price mechanism.*

Again, in the "typical" strict liability case, the consumer must bear the loss alone if he is unable to impose liability on the manufacturer. The same does not hold true for members of the Armed Forces. Complete medical and extensive disability benefits are provided for all members of the Armed Forces and their dependents upon the member sustaining injuries or death. 38 U.S.C.A. Section 301 *et seq.*, Section 401 *et seq*. Moreover, since the munitions contractor will ultimately pass any loss on to the United States Government (the United States being the sole consumer), the Government will find itself in a position of making the damaged parties "whole" through litigation in addition to paying the statutory benefits.

In addition to the policy considerations above-discussed, Day and Zimmermann submits that there is some significance to be attached to the fact that the Respondents here were in combat and under martial, not civil, law. If strict liability is extended to the instant case, countless personal injuries suits can be envisioned.

This case differs from the products liability cases as was noted in *Littlehale v. E. I. Dupont de Nemours & Co.*, 380 F.2d 274.

B. Day and Zimmermann is an independent contractor that did not sell the shell in question nor was it engaged in the business of selling such shells.

Conceptually strict liability is applied to sellers and others in a commercial atmosphere. This Petitioner is

not a "seller" and, in fact, places nothing whatsoever into the stream of commerce as goods and chattels.

The Lone Star Army Ammunition Plant at which Day and Zimmermann operates, is wholly owned by the United States Government. All parts, pieces and components which enter the plant and which are to be assembled by Day and Zimmermann are wholly owned by the United States Government. The finished products are wholly owned by the Government. At no time does title to any of the various parts, equipment, or buildings used by Day and Zimmermann vest in or become owned by Day and Zimmermann.

C. Strict liability in tort under Texas law is limited in application to "sellers" and does not extend to non-selling independent contractors.

Texas has adopted the doctrine of strict liability in tort as expressed in Section 402A for sellers of products.[4] Day and Zimmermann did not sell the shell in question nor that it was engaged in the business of selling that product. The question presented, therefore, is whether the Texas law has extended the scope of Section 402A beyond the literal language employed therein so as to impose its provisions upon suppliers who are non-sellers. The issue has been presented to the Texas courts on three separate occasions and on each occasion the Texas court ad-

4 *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex.Sup. 1967), *Shamrock Fuel and Oil Sales Co. v. Tunks*, 416 S.W.2d 779 (Tex.Sup. 1967), *Messick v. General Motors Corporation*, 460 F.2d 485 (5th Cir. 1972).

dressing this matter has answered this question in the negative.[5]

CONCLUSION

Accordingly, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Fifth Circuit, and, after briefing and argument, that judgment should be reversed.

Respectfully submitted,

ATCHLEY, RUSSELL,
WALDROP & HLAVINKA
803 Spruce Street,
P. O. Box 1049
Texarkana, Texas 75501

Norman C. Russell

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this the ____ day of August, 1975, a true and correct copy of the above and foregoing Petition for Writ of Certiorari was placed in the United States mail, postage prepaid, to Mr. Cahill Hitt, P. O. Box 18, Texarkana, Texas 75501, Attorney for Respondents.

Norman C. Russell

5 *Barbee v. Rogers*, 425 S.W.2d 342 (Tex.Sup. 1968); *Shivers v. Good Shepard Hospital, Inc.*, 427 S.W.2d 104 (Tex.Civ.App. — Tyler 1968, writ ref'd, n.r.e.); and *Freitas v. Twin City Fisherman's Cooperative Association*, 452 S.W.2d 931 (Tex.Civ.App. — Austin 1970, writ ref'd, n.r.e.).

APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

CIVIL ACTION NO. 1500

HAWLEY K. CHALLONER, ET AL
versus
DAY AND ZIMMERMANN, INC., ET AL

JUDGMENT

On this the 15th day of October, 1973, came on to be heard the above entitled and numbered cause whereupon a jury was selected and on the same date all of the parties proceeded to present their pleadings, evidence and argument of counsel and on the 17th day of October, 1973 the Motion for Summary Judgment of Harvey Aluminum, Inc. was granted by the Court and also on the 17th day of October, 1973 said cause was submitted to the Jury under instructions of the Court, said Jury deliberating on said date and reconvening for continuation of its deliberations on the 18th day of October, 1973, at which time the Jury did read its verdict into open court finding in favor of Plaintiffs and against the Defendant, Day and Zimmermann, Inc., as follows:

For Plaintiff, HAWLEY K. CHALLONER, Two Hundred Thousand and no/100 ($200,000.00) Dollars; for Plaintiff, DAVID E. NELMS, individually and as administrator of the Estate of Daniel E. Nelms, Forty Thousand and no/100 ($40,000.00) Dollars.

Trial Court Judgment

It is, therefore ORDERED, ADJUDGED AND DECREED that Plaintiff, HAWLEY K. CHALLONER, recover of and from Defendant, DAY AND ZIMMERMANN, INC., the sum of TWO HUNDRED THOUSAND AND NO/100 ($200,000.00) DOLLARS, and his costs of court and interest from date of entry at the rate of six (6%) per cent per annum, for which let execution issue.

It is further ORDERED, ADJUDGED AND DECREED that Plaintiff, DAVID E. NELMS, individually and as Administrator of the Estate of Daniel E. Nelms, have and recover against Defendant, DAY AND ZIMMERMANN, INC., the sum of FORTY THOUSAND AND NO/100 ($40,000.00) DOLLARS, for costs of court and interest from date of judgment at six (6%) per cent per annum, from which let execution issue.

It is further ORDERED, ADJUDGED AND DECREED that Plaintiffs, HAWLEY K. CHALLONER and DAVID E. NELMS, individually and as administrator of the Estate of Daniel E. Nelms, take nothing against Defendant, HARVEY ALUMINUM, INC., and further that Defendant, DAY AND ZIMMERMANN, INC., take nothing against HARVEY ALUMINUM, INC., by way of contribution or indemnity.

ENTERED this 18th day of October, 1973.

/s/ JOE J. FISHER
United States District Judge

Trial Court Judgment

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-1555

D. C. Docket No. CA-1500

HAWLEY K. CHALLONER, ET AL., Etc.,
Plaintiffs-Appellees,
versus

DAY AND ZIMMERMANN, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Texas

Before BROWN, Chief Judge, and COLEMAN and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 24, 1975

Hawley K. CHALLONER et al, etc.,
Plaintiffs-Appellees,

v.

DAY AND ZIMMERMANN, INC., et al., Defendants-Appellants.

No. 74-1555.

United States Court of Appeals,
Fifth Circuit.

April 24, 1975.

Appeal from the United States District Court for the Eastern District of Texas.

Before BROWN, Chief Judge, and COLEMAN and DYER, Circuit Judges.

COLEMAN, Circuit Judge.

The premature explosion of an 105 mm. howitzer round in Cambodia, May 22, 1970, while the Armed

Forces of the United States were engaged in combat with the North Vietnamese, prompted this diversity suit. Hawley K. Challoner, of Wisconsin, was seriously injured by the explosion. Daniel E. Nelms, of Tennessee, was killed. Suit was grounded upon strict liability principles enunciated by Texas law. There was a jury verdict of $200,000 for Challoner, and a $40,000 award for Nelms' administrator against Day and Zimmermann. The defendant had manufactured the artillery round in Texas. The difficulties of the case are quickly recognized, but we affirm the judgment of the District Court.

Day and Zimmermann is incorporated in Maryland and has its principal place of business in Pennsylvania.

Under Texas law the plaintiffs had the burden of establishing by a preponderance of the credible evidence that a defect in the ammunition was the cause of the premature explosion.

Plaintiffs produced a number of witnesses. The direct evidence was supplied by James Schrader, for twenty-eight years an ammunition control specialist for the Army. Schrader testified that the most likely cause of the premature explosion was the existence of cavitation in the explosive material Composition B poured into the artillery round by Day and Zimmermann. This cavitation, said Schrader, resulted in explosion inducing collapse of the Composition B before it had reached the end of the gun tube.

Schrader's testimony was buttressed by the testimony of an Army Major who investigated the accident. The Major's opinion was that the explosion was the result of an ammunition malfunction.

Various gun crew members testified that all safety procedures had been followed, which tended to eliminate causes other than ammunition defects, thus corroborating Schrader.

Finally, plaintiffs introduced United States Government reports of tests of ammunition taken from the same lot as the round which had exploded. These reports showed that some of the tested rounds had cavities in the explosive material.

Defendants countered with expert testimony that the defects turned up by the government tests were insufficient to cause a premature explosion. An agent of Day and Zimmermann testified that defendants made the ammunition precisely in accordance with government design; it had fully followed the government approved inspection system designed to uncover any defects. An agent of the United States testified that government inspectors rigidly monitored Day and Zimmermann to assure that the government approved designs and specifications were followed.

The District Judge held that the strict liability principles of Texas law governed and submitted the case to a jury.

The assigned errors may be topically considered as follows:

I

Was the District Court Correct in Applying Texas Substantive Law?

Defendants argue that the District Court erred in applying the substantive law of Texas. It says that under the decisions in Erie v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and Klaxon v. Stentor Electric Manufacturing Company, Inc., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941), the conflict of law rules of the Texas forum must be applied, and that under Texas conflict of law rules, the law of Cambodia, the place of the injury, governs.

It is not to be denied that the much discussed decision[1] in *Klaxon, supra*, held, as a general rule, that the conflict of laws rules of the forum applies in a diversity case. The *Klaxon* Court was "of opinion that the prohibition declared in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court . . . must conform to those prevailing in . . . state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal

1 See e.g., Wright, Law of Federal Courts, § 57, p. 236; Horowitz, Toward: A Federal Common Law of Choice of Law, 14 U.C.L.A. Law Review 1190; and Hart, "The Relations between State and Federal Law", 54 Columbia Law Review at 514. Hart summarizes the case against *Klaxon* in the following language:

[Choice of law questions] are essentially federal, in the sense that they involve, by hypothesis, more than one state. To the solution of no other type of controversy is the diversity jurisdiction better adapted.

courts sitting side by side". 313 U.S. at 496, 61 S.Ct. at 1021.

This would mean that, applying Texas choice of law rules, certainly as to the wrongful death, Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex., 1968), and Click v. Thuron Industries, Inc., 475 S.W.2d 715 (Tex., 1972), and perhaps as to the personal injury, compare *Marmon, supra,* and *Click, supra,* with Couch v. Mobile Oil Corporation, D.C., 327 F.Supp. 897 (1971), and Continental Oil Company v. Lane Wood & Company, 443 S.W.2d 698 (Tex., 1969), the substantive law of Cambodia would control.

For a number of reasons, however, we hold to the contrary. First, there is our decision in Lester v. Aetna Life Insurance Company, 5 Cir., 1970, 433 F.2d 884, cert. denied 402 U.S. 909, 91 S.Ct. 1382, 28 L.Ed.2d 650. *Lester* was a diversity action on a life insurance policy. Plaintiff-beneficiary was a Louisiana citizen; defendant insurer was a Connecticut insurance company which did business in Wisconsin and which had issued the policy in Wisconsin. The action was begun in Louisiana state court and removed to federal court.

The insurer's defense was that the policy had been cancelled. Plaintiff claimed the cancellation was ineffective because it was not preceded, as required by Louisiana law, by written notice that premiums were due. Defendant relied on Wisconsin law which required no notice. The issue was whether Louisiana or Wisconsin law governed.

We refused to look to the Louisiana conflict of law rule, deciding that as a matter of federal choice of law,

we could not apply the law of a jurisdiction that had no interest in the case, no policy at stake. The Wisconsin law was designed for the protection of Wisconsin insurers. Defendant was not a Wisconsin insurer; thus, Wisconsin had no interest in the case. On the other hand, since a Louisiana citizen was the insured party, the Louisiana policy of protecting insured parties by requiring notice was at stake. As the arbiter of relations between the states, we deemed it wholly inappropriate to apply any law other than the law of the only jurisdiction that had any real interest in the contest.

The *Lester* principle controls here. Like Wisconsin in *Lester,* Cambodia has no interest in this dispute between American litigants. The Cambodian requirement that fault be proved is a policy designed to afford a high degree of protection for Cambodian manufacturers; Cambodia in indifferent to the protection of American manufacturers.

On the other hand, it might be said that Wisconsin, Tennessee, Pennsylvania, and Texas all have a substantial interest in this case. Wisconsin, Challoner's domicile, and Tennessee, Nelm's domicile, are strict liability states, Ford Motor Company v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1965); Howes v. Hansen, 56 Wis.2d 247, 201 N.W.2d 825 (1972). The policy of these states is to provide maximum protection for their injured citizens. Wisconsin and Tennessee citizens are the injured parties. The Wisconsin and Tennessee policy of affording maximum protection to their injured citizens will be carried out by Texas law since Texas is also a strict liability state, Darryl v. Ford Motor Company, 440 S.W.2d 630 (Tex., 1969).

Pennsylvania, the state where defendant has its principal place of business, like Texas, is a strict liability state, Hoffman v. A. B. Chance Company, 346 F.Supp. 991 (M.D. Pa., 1972). The strict liability policy of both Pennsylvania and Texas is designed in part to require a high standard of care of their manufacturers — a policy which would be frustrated by the application of Cambodian law. Thus, application of Texas law will promote the interests of Wisconsin, Tennessee, Pennsylvania, and Texas, while having no effect on the interests of Cambodia which is concerned only with financial protection for Cambodian manufacturers.[2]

In short, these facts fit squarely within the *Lester* principle. This is a case in which the policies of all jurisdictions having an interest in the dispute will be carried out through application of Texas law. No jurisdiction will have any policy frustrated by application of that law. In such a situation, *Lester* dictates that as a matter of federal choice of law, we apply the law of the jurisdictions having a legitimate interest in the contest, any state conflict of law rule to the contrary notwithstanding. However controlling state law may be in most diversity cases, it does not extend

2 Since a member of the United States Armed Services is involved in this case, the United States also has an interest. However, since "there is no general federal common law", Erie v. Tompkins, *supra*, we are unable to say with any substantial degree of certainty what the United States policy is regarding compensation of injured servicemen. We believe, however, that the people of the United States would not desire that their servicemen be subjected to less stringent standards of care than are provided by their own home states.

so far as to bind a federal court to the law of a wholly disinterested jurisdiction.[3]

In addition to the holding in *Lester*, we find other compelling reasons for not allowing Texas conflict of law rules to dictate a resort to Cambodian law. One such reason is that the rationale for application of the traditional (place of the injury) conflict rule applied by Texas courts is not operative under the present facts. The traditional conflict rule is grounded upon the premise that sovereign powers have the exclusive authority to determine rights and liabilities arising out of transactions occurring within their borders. As explained by Mr. Justice Story:

> I. The first and most general maxim or proposition [of conflict of law] is that . . . every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is that the laws of every state affect, and bind . . . all persons, who are resi-

3 The United States Supreme Court has recognized that not every diversity case will be governed, in all its aspects, by state law. For example, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) was a diversity case in which a primary issue was whether recognition should be given petitioner's title in sugar — title which had been gained through the Cuban government's expropriation from a former owner. The court held the question should be resolved by federal law, citing with approval Professor Jessup's warning of this danger implicit in allowing states to decide questions affecting national relations.

In Howard v. Lyons, 360 U.S. 593, 79 S.Ct. 1331, 3 L.Ed.2d 1454 (1959), civilian labor union leaders claimed an American military officer had defamed them and, invoking diversity jurisdiction, sued for libel. The officer claimed that since his statements were made in the course of his military duties, it was privileged. The Supreme Court held, inter alia, that despite the fact that the action was founded on state law and despite the fact that diversity of citizenship was the basis of jurisdiction, the validity of the defense was to be judged by federal standards.

dent within it, whether natural born subjects, or aliens; and also all . . . acts done within it.

* * * *

II. Another maxim, or proposition, is, that no state or nation can, by its laws, directly affect, or bind . . . persons not resident therein, whether they are natural born subjects, or others. This is a natural consequence of the first proposition; for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate persons . . . not within its own territory.

Story, Commentaries on the Conflict of Laws, 2d ed., 1841.

Under familiar principles of international law, the place of the injury, in this case Cambodia, had no authority to govern the persons or transactions involved in this law suit. As put by Chief Justice Marshall, "A [nation] is understood to cede a portion of [her] territorial jurisdiction where [she] allows the troops of a foreign nation to pass through [her] dominions", The Schooner Exchange v. M'Faddon, 7 Cranch 116, 139, 3 L.Ed. 287 (1812).

Thus, the only imaginable reason for applying Cambodian substantive law — the right of a sovereign to govern transactions within its borders — evaporates. Cambodia, under established principles of international law has no right to determine rights or

liabilities as between foreign subjects arising out of the military activities of a foreign power.

A third and final reason for not applying Cambodian law lies in the very nature of this Court. We are a Court of the United States, an instrumentality created to effectuate the laws and policies of the United States. We conclude that in this case we have no warrant, legal or moral, to frustrate well established American policies by an application of the local policies of a foreign government.

The District Court was correct in applying Texas substantive law.

The remaining inquiry, then, is whether Texas law was correctly applied.

II

In Texas, Can Non-Sellers Be Held Strictly Liable?

Defendants direct our attention to the fact that by its literal terms Restatement § 402(a) refers only to *sellers*. Under their contract with the government, defendants sold nothing. They simply assembled materials purchased by the government. Never having had title to the goods, they were not a seller; hence, defendants say that the principles of strict liability are inapplicable.

While defendants are quite correct in their observation that the express term of Restatement § 402(a) refers only to sellers, the Texas courts have been more liberal, not requiring a literal sale for the attachment

of strict liability. Rather, strict liability attaches whenever "the transaction by which a product is transmitted into the stream of commerce is 'essentially commercial' in character", Rourke v. Garza, 511 S.W.2d 331, 336 (Tex.Civ.App. 1974); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Freitas v. Twin City Fisherman's Cooperative Association, 452 S.W.2d 931 (Tex.Civ.App. 1970).

The ammunition in this case came into commerce via a commercial transaction, here, a "cost plus" contract. This is all that is necessary for the attachment of strict liability under Texas law.

III

Was There Error in Instructing The Jury That it Could Find Defendants Liable if Product was Defectively Designed?

Defendants claim there was reversible error in giving the following instruction:

> "You are further instructed that a defect in any product can arise from one or two different origins. The first such form of defect is one that arises due to some miscarriage in the production or assembly process so that the product is not produced as it had been planned. An example of a defective product of this type is one which contained a foreign substance or has unintended features. The other form of such defect is one that results from the design of a given product. An example of the defective product of this type is one that was used exactly as designed and intended and yet still was in a defective condition that was unreasonably dangerous to cause of the design. Should you find from a preponderance of the evidence that a defect, if any, in the said 105 Howitzer shell was in a sealed component part of the shell you may infer that such condition existed at the time it was sold."

This instruction might indicate that the jury should find defendants liable if it found the product was defectively designed. This, defendants say, the jury was not entitled to do since design was exclusively within the control of the government. Numerous cases are cited which have held that a contractor is not liable for injuries caused by the defective design furnished him by another unless the design is so glaringly or obviously dangerous that the contractor should have been alerted. See, e.g., Ryan v. Feeney & Sheehan Building Company, 239 N.Y. 43, 145 N.E. 321, 41 A.L.R. 1 (1924), and Davis v. Henderlong Lumber Company, 221 F.Supp. 129 (N.D. Ind., 1963).

The difficulty with this argument is that the cited cases which absolve defendants who follow defective designs of another were not decided under a strict liability theory. They involved attempts to demonstrate negligence and stand only for the proposition that there is no negligence in following the design of another unless the design is such that the defectiveness was sufficiently obvious to alert a reasonably competent technician to the danger.

In this case, it was not necessary to prove negligence. The theory alleged is strict liability. A

strict liability case, unlike a negligence case, does not require that the defendant's act or omission be the cause of the defect. It is only necessary that the product be defective when it leaves the defendant's control. A specific example of this principle is found in Comment (f) to Restatement § 402(a) which says that strict liability applies to "wholesalers, retailers, or distributors" who sell defective products, notwithstanding the fact that these parties will not normally be the ones who caused the existence of the defect. Texas cases which have held principles of strict liability to attach even though defendant was not the party who caused the existence of the defect are McKisson v. Sales Affiliates, 416 S.W.2d 787 (Tex. 1967), and Sharp v. Chrysler Corporation, 432 S.W.2d 131 (Tex.Civ.App., 1968), holding dealer strictly liable for defect in automobile.

IV

Was There Sufficient Evidence To Allow the Jury to Conclude That the Round was Defective When It Left Defendants' Hands?

Defendants contend the evidence was insufficient to allow the jury to conclude that the shell was defective. This argument is weighed by the standards we set forth in Helene Curtis Industries, Inc. v. Pruitt, 5 Cir., 1967, 385 F.2d 841, 850, which held that a jury's verdict must be upheld "if there is a rational basis in the record" for it.

A rational basis for the jury's verdict in this case was provided by the testimony of plaintiffs' expert James C. Schrader who said that the most probable cause of the explosion was cavitation in the Composition B material that defendant poured into the projectile. Schrader's testimony was buttressed by the testimony of various soldiers who swore that all required safety procedures had been followed. Such testimony could justify the elimination of the probability that user neglect caused the premature explosion. Similar circumstantial evidence was held sufficient to support a jury's verdict in Franks v. National Dairy Products Corporation, 5 Cir., 1969, 414 F.2d 682.

V

Did the Trial Judge Err in Admitting United States Government Reports of Shell Tests?

Following the explosion, the government tested artillery shells drawn from the same lot as the shell which prematurely exploded. These tests showed that a number of the shells had cavities in the explosive material, leaving the jury an opportunity to infer that the shell in question was likely to have had similar cavities.

Defendants argue that the reports were inadmissible hearsay. We do not agree that they were inadmissible. Dallas County v. Commercial Union Assurance Company, 5 Cir., 1961, 286 F.2d 388, held that a federal district court is entitled to admit evidence inadmissible under state law if that evidence is trustworthy and of probative value. Only an abuse of discretion will require reversal.

Here, the evidence was gathered by the government, which had as its sole incentive the determination of

whether the shells were, in fact, defective. This assured a high degree of trustworthiness. The fact that other shells in the lot had cavities in the explosive material was relevant since it increases the probability that the shell in question had a similar deficiency. Thus, this evidence was both trustworthy and relevant. The trial judge did not abuse his discretion in admitting it.

VI

Should We Refuse To Apply The Principles of Strict Liability On A Public Policy Basis?

Finally, defendants note that many of the justifications for the adoption of strict liability are not present in this case. For example, defendants argue that this is not a case in which plaintiffs acted in reliance on advertisements or warranties, and is not a case in which strict liability will induce greater care since defendants' procedures are government controlled. In one respect, defendants are no doubt correct; not all of the reasons that have justified the move to strict liability are present here. However, the most basic and primary justification for imposing strict liability is present. "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves", Foster v. Day & Zimmermann, Inc., 8 Cir., 1974, 502 F.2d 867, 871, quoting Hawkeye-Security Insurance Company v. Ford Motor Company, 174 N.W.2d 672 (Iowa, 1970), which takes the quote from the leading strict liability case of Greenbaum v. Yuba Power

Products, Inc., 59 Cal.2d 57, 27 Cal.Rptr. 697, 700, 377 P.2d 897, 900 (1963).

We therefore agree with the Eighth Circuit's rejection of the defendants' public policy argument.

> "In making the grenade and its component parts the defendants knew that it was made for military personnel and that it was to be used by them. We believe the public interest in human life and health requires the protection of the law against the manufacture of defective explosives, whether they are to be used by members of the public at large or members of the public serving in our armed forces."

Foster v. Day & Zimmermann, Inc., 8 Cir., 1974, 502 F.2d at 871.

In upholding the recovery for wrongful death we are not unmindful of the decision of this Court in Ramirez v. Autobuses Blancos Flecha Roja, 5 Cir., 1973, 486 F.2d 493. In that case a Mexican national, in Texas, bought a bus ticket from a Mexican corporation for transportation from Laredo to Saltillo. In Mexico, while enroute to Saltillo, there was a collision in which the passenger was killed. Texas, of course, had nothing to do with the collision. Citing Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex., 1968) we held, in effect, that the Texas wrongful death statute has no extra-territorial effect. In *Marmon* it had been held that the law of Colorado, where the deaths occurred, provided the appropriate remedy. Those deaths, however, were caused by pilot error, something Texas had absolutely nothing to do with.

We said that "the Texas Wrongful Death Act as recently and authoritatively construed is not an available remedy where the injury causing death did not occur on Texas soil".

Nevertheless, in a highly vital respect the present appeal is not like *Marmon:* the wrongful act, i.e. the defective loading of the shell, occurred in Texas. Thus Texas had the same intimate connection with the death here in question as if a defendant standing in Texas had killed a man by firing a rifle across the state line. Additionally, as already pointed out, the direct culmination of the defective manufacture occurred not in some other state of the American Union, as in *Marmon,* but on foreign soil in which the foreign government had no jurisdiction over what was taking place. In our considered judgment, then, the Supreme Court of Texas, if it had this appeal, would hold that conventional notions of extra-territoriality do not encompass the peculiar situation we have here and would further hold that the Texas Legislature had in mind no such an extra-territorial limitation when it enacted the Wrongful Death Statute.

The judgment of the District Court is

Affirmed.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1555

HAWLEY K. CHALLONER, ET AL., ETC.,
Plaintiffs-Appellees,

versus

DAY AND ZIMMERMANN, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Texas

ON PETITION FOR REHEARING
(June 2, 1975)

Before BROWN, Chief Judge and COLEMAN and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

June 17, 1975

Mr. Norman C. Russell
Attorney at Law
803 Spruce Street
P. O. Box 1049
Texarkana, Texas 75501

No. 74-1555 — Hawley K. Challoner, et al., etc. vs. Day and Zimmermann, Inc., et al

MANDATE STAYED TO AND INCLUDING July 17, 1975

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in con-

nection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ CAROL G. LeSAGE
Deputy Clerk

enc.
cc: Mr. Cahill Hitt

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HAWLEY K. CHALLONER, ET AL.,
Plaintiffs-Appellees,

versus No. 74-1555

DAY AND ZIMMERMANN, INC., ET AL.,
Defendants-Appellants.

ON CONSIDERATION OF THE APPLICATION of the appellants in the above numbered and entitled

cause for a further stay of the mandate of this Court therein, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is further stayed to and including August 15, 1975, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ JAS. P. COLEMAN
UNITED STATES
CIRCUIT JUDGE

Supreme Court, U. S.
FILED
SEP 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-245

DAY & ZIMMERMANN, INC.,
Petitioner,

versus

HAWLEY K. CHALLONER, DAVID E. NELMS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DANIEL E. NELMS, AND MARY EDNA NELMS,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Cahill Hitt
HITT, PESEK & LOVETT
2605 Texas Boulevard
P. O. Box 18
Texarkana, Texas 75501

LAW OFFICES OF
JERRY H. SUMMERS, P.C.
500 Lindsay Street
Chattanooga, Tennessee 37403

ATTORNEYS FOR RESPONDENT

SCOFIELDS QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 504 822 1611

TABLE OF CONTENTS

	Page
Statement of the Case	1
Opposition to Question I	2
Opposition to Question II	9
Conclusion	13
Certificate of Service	14
Appendix A	1a
Appendix B	4a

INDEX OF AUTHORITIES

SECONDARY AUTHORITIES

Banco Nacional de Cuba v. Sabbationo, 371 U.S. 84 (1964)	6
Barth v. B. F. Goodrich Co., 265 A.C.A. 253, 71 Cal. Rptr. 306 (1968)	10
Click v. Thuron Industries, Inc., 475 S.W. 2d 715 (Tex. 1972)	3
Continental Oil Company v. Lane Wood & Company, 443 S.W. 2d 698 (Tex. 1969)	2,3,5
Couch v. Mobil Oil Company, 327 F. Supp. 897 (S.D. Tex. 1971)	6
Darryl v. Ford Motor Co., 440 S.W. 2d 630 (Tex. 1969)	10
Day & Zimmermann v. Calvert, 519 S.W. 2d 106 (Tex. 1975)	2,11
Foster v. Day & Zimmermann, Inc., 502 F.2d 867 (8th Cir. 1974)	12

INDEX OF AUTHORITIES (Continued)

Page

Howard v. Lyons, 360 U.S. 593 (1929) 7

Lester v. Aetna Life Insurance Company, 433 F.2d 884, cert. den. 402 U.S. 909 (1970) 5

Malinak v. Firestone Tire & Rubber Co., 436 S.W. 2d 210 (Tex.Civ.App. — Houston 1st Dist 1969) 10

Marmon v. Mustang Aviation, Inc., 430 S.W. 2d 182 (Tex. 1968) 2,3

McKisson v. Sales Affiliates, Inc., 416 S.W. 2d 787 (Tex. 1967) 9,10

Putman v. Erie Manufacturing Co., 338 F.2d 911 (5th Cir. 1964) 10,11

Rourke v. Garza, 511 S.W.2d 331 (Tex. Civ.App. — Houston, 1974) 9

The Schooner Exchange v. M'Faddon, 7 Cranch 116, 3 L.Ed. 287 (1812) 8

United States v. Standard Oil Co., 332 U.S. 301 (1947) 6

TERTIARY AUTHORITIES:

Hill, "HOW STRICT IS STRICT?".. 32 Tex. Bar. Journ. (Nov. 1969) 759 10

Restatement of Torts 2d, Sec. 402 A 9,10,11,13

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-245

DAY & ZIMMERMANN, INC.,
Petitioner,

versus

HAWLEY K. CHALLONER, DAVID E. NELMS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DANIEL E. NELMS, AND MARY EDNA NELMS,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case as being substantially correct except the statements contained in Page 4 of Petitioner's brief which state: "The sole plant function was to load, assemble, and pack (as distinguished from manufacture) ammunition from materials purchased and owned exclusively by the United States Government" and "There was no sale by Petitioner to the United States of any product, and it never had any right of ownership in the ammunition." Respondent would submit that these two recitations are incorrect and that in fact Day

& Zimmermann, Inc., did purchase the component parts from vendors and did sell the completed product to the United States Government. This fact has been reduced to certainty by the judicial holding of the Texas Supreme Court in *Day v. Zimmermann v. Calvert*, 519 S.W. 2d 106 (Tex. 1975).

OPPOSITION TO QUESTION I

THE COURT OF APPEALS CORRECTLY APPLIED THE LAW OF TEXAS, OR, IN THE ALTERNATIVE, CORRECTLY PREDICTED WHAT THE TEXAS SUPREME COURT WOULD HAVE HELD HAD IT BEEN PRESENTED WITH THE SAME QUESTIONS.

The claim for injury of Plaintiff Challoner and the wrongful death claim of Plaintiff Nelms' survivors are not based on Arts. 4671 and 4678, Tex. Rev. Civ. Stats., but on judgment made Texas choice-of-law rules for torts and wrongful death which, having shown considerable capacity of evolution in the past, is capable of evolution in the present. Consequently, the Texas Supreme Court could, and in the light of *dicta* in *Marmon v. Mustang Aviation, Inc.*, 430 S.W. 2d 182 (Tex. 1968) and the language in *Continental Oil Company v. Lane Wood & Company*, 443 S.W. 2d 698 (Tex. 1969) in all probability would, refuse to follow the *lex loci delicti* rule in a case like the present one, where Cambodia's "connection with the transaction is minimal and fortuitous, and (where) it has no interest in the . . . controversy." *Continental Oil Company v. Lane Wood & Company, supra*, at P. 701.

While Petitioner is correct in its statement that the Texas Supreme Court has refused to give extraterritorial effect to the Texas Wrongful Death Statute in controversies involving sister states, *Marmon v. Mustang Aviation, Inc., supra*, and *Click v. Thuron Industries, Inc.*, 475 S.W. 2d 715 (Tex. 1972), petitioner is incorrect in stating that the Court of Appeals applied its own "choice of law" rule because the Texas Supreme Court has not been presented with a similar case involving a foreign nation whose interest is only minimal and fortuitous.

In fact the Texas Supreme Court appears to have taken a decisive step towards adopting a new approach to conflict of laws in the *Continental Oil Company Case, supra*. The facts of that case are unusually complex. An Ohio manufacturer (Carlon) had sold a quantity of plastic pipes to an Amarillo distributor (Allied), which resold them to the ultimate purchaser (Western), delivery being effected by the distributor's trucks at the ultimate purchaser's job site in Oklahoma. Allied's check to Carlon was dishonored, and it went into bankruptcy. Western paid the purchase price for the pipes into Court, and there was a dispute between the manufacturer's successor (Continental), and the bankrupt's Texas factor and assignee (Lane Wood) over this fund. At the time of the transactions, Ohio and Oklahoma had adopted the U.C.C. but Texas had not. Under the U.C.C. (now Sec. 2.403, Tex. Business and Commerce Code) the entrusting of the goods to a merchant dealing with goods of that kind gives the latter power to transfer all rights of the entruster in the ordinary course of business.

After noting that there was a choice-of-law question, Mr. Justice Walker went on to observe for a unanimous Texas Supreme Court:

> "As for the sale from Allied to Western, the order was placed with Allied's office in Amarillo by Western's office in El Paso. It directed that the pipe be shipped best way prepaid. Allied then arranged for the pipe to be delivered to its trucks at Carlon's plant in Corsicana on unrestricted bills of lading consigned to Western at Texhoma, Oklahoma. The sale was then arranged in Texas between parties doing business here. The pipe had not previously been in Oklahoma but was moved there solely for the purpose of making delivery to Western. Any title owned by Allied would have passed in Texas if it had elected to make delivery by common carrier rather than by its own trucks. It does not appear that Continental, Carlon, Allied or Western is a resident of Oklahoma. Lane Wood is a Texas corporation and relies on the law of this state to give priority and effect to its assignment of accounts and factor's lien agreement. *Oklahoma's connection with the transaction is minimal and fortuitous, and it had no interest in the present controversy.* We hold that the Texas Law controls." (Emphasis added) at P. 701.

This case is clear authority that under current Texas choice-of-law rules, the law of a foreign state will not be applied if its "connection with the transaction is minimal and fortuitous, (if) it has no interest in the

controversy." Or, stated another way, the law of a foreign state will not be applied where there is a *false conflict*.

This is exactly what the Court of Appeals held in the present case, i.e., Cambodia's connection with the controversy between Challoner and Nelms v. Day & Zimmermann, Inc., is "minimal and fortuitous and it has no interest in the controversy. This is in accord with the *Continental Oil Company Case, supra*, and with *Lester v. Aetna Life Insurance Company*, 433 F.2d 884, cert. den., 402 U.S. 909 (1970).

Lester, supra, was a diversity action on a life insurance policy. Plaintiff-beneficiary was a Louisiana citizen; defendant-insurer was a Connecticut Insurance company which did business and which had issued the policy in Wisconsin. The action began in Louisiana State Court and was removed to Federal Court.

The insurer's defense was that the policy had been cancelled. Plaintiff claimed the cancellation was ineffective because it was not proceeded, as required by Louisiana Law, by written notice that premiums were due. Defendant relied on Wisconsin Law which required no notice. The issue was whether Louisiana or Wisconsin Law applied.

The Fifth Circuit held that this was a "false conflict" since Wisconsin had no interest in the case and applied the law of Louisiana. The Wisconsin Law was designed for the protection of Wisconsin insurers. Defendant was not a Wisconsin insurer; thus, Wisconsin had no interest in the case. The *Lester* principle

should control here in a controversy between American citizens.

The Cambodian requirement that fault be proved is a policy designed to afford a high degree of protection for Cambodian manufacturers; Cambodia is indifferent to the protection of American manufacturers. Thus, a false conflict.

The holding in the case at bar is also in accord with the holding in *Couch v. Mobil Oil Company*, 327 F. Supp. 897 (S.D. Tex. 1971). That case involved a tort claim by an American citizen against an American company for an injury occurring in Libya. The Court refused to apply Libyan Law and applied the law of Texas.

The Court of Appeals, therefore, adopted the correct Choice of Law Rule and the one the Texas Supreme Court probably would have adopted, since Cambodia had no interest in the case.

If this Court is convinced that Texas would follow *lex loci delicti* under the facts of this case, then, in the alternative, Plaintiffs-Respondents would argue that there exists a "federal common law" of conflicts which should be applied here. This Court has applied federal Choice-of-Law Rules in cases involving American citizens and foreign nations. *Banco Nacional de Cuba v. Sabbationo*, 371 U.S. 84 (1964); *United States v. Standard Oil Co.*, 332 U.S. 301 (1947).

In the *Standard Oil Case, supra*, this Court stated at P. 308:

> ". . . there remains what may be termed, for want of a better label, an area of 'federal common law' or perhaps more accurately 'law of independent federal judicial decision', outside the constitutional realm, untouched by the *Erie* decision."

The present case is such a case and the states should not be allowed to decide questions affecting international relations. *Howard v. Lyons*, 360 U.S. 593 (1929).

Furthermore, by treaty, Cambodia ceded to the United States the right to apply its law to American material and personnel. Attached hereto as Appendix "A" is the agreement affected by a change of notes signed at Phnom Penh, August 20, 1970; which went into force on that date. The Court will note that in Paragraph 1 of such agreement:

> "All defense articles furnished to the Government of Cambodia shall be subject to the requirements of United States Law . . . and
>
> * * *
>
> (2) . . . United States Government personnel discharging the responsibilities specified in this paragraph will operate as a part of the Embassy of the United States of America under the direction and control of the Chief of the Diplomatic Service and will have the same privilege and immunities as are accorded other personnel in comparable position in the Embassy of the United States."

This agreement is in accord with this Court holding in *The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 3 L.Ed. 287 (1812).

> "A (nation) is understood to cede a portion of (her) territorial jurisdiction where (she) allows the troops of a foreign nation to pass through (her) dominions." P. 139.

In either event, whether the Court of Appeals applied what it believed to be the Law of Texas or applied a federal Choice-of-Law Rule, strict liability must apply since Cambodia has absolutely no interest in the controversy. "[T]he public interest in human life and health requires . . ."[1] the application of strict liability in this case.

It should further be brought to the Court's attention that Defendant, Day & Zimmermann, Inc., is acting inconsistently and in bad faith by contending that Cambodian Law should apply. In the case of *Burns v. Day & Zimmermann, Inc.*, 71 CIV, 3205, U.S. District Court, Southern District of New York, the same Defendant stipulated that Texas Law was applicable as is evidenced by the Stenographer's Minutes attached hereto as Appendix "B". In that case the Plaintiffs brought suit against the same Defendant for a premature explosion of a defective shell, said explosion occurred within the country of Viet Nam. The Court will note that on Page 2 of the Minutes of the case that Mr. Brumbelow, the attorney for Defendant, Day & Zimmermann, Inc., stipulated that Texas Law is applicable.

---

1 Foster v. Day and Zimmermann, Inc., 502 F. 2d 867 (8th Cir., 1974).

OPPOSITION TO QUESTION II

THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE APPLICATION OF THE DOCTRINE OF STRICT LIABILITY BECAUSE DAY AND ZIMMERMANN, INC., WAS A MANUFACTURER OR ASSEMBLER OF GOODS AND TRANSMITTED SAID GOODS INTO THE STREAM OF COMMERCE BY A SALE OR OTHER ESSENTIALLY COMMERCIAL TRANSACTION.

Petitioner, in its attack upon the opinion of the Court of Appeals urges a very restrictive interpretation of the words "sale", "sellers" and "business of selling." Petitioner makes a secondary attack upon the judgment of the Trial Court by attempting to limit the effect of Sec. 402 A, *Restatement of Torts, 2d*. Petitioner also attacks the opinion of the Court of Appeals on some sort of public policy basis. Respondents will answer these attacks in the order listed below.

Texas has never strictly construed the word "sale", "sellers", or "business of selling" from the initial landmark case of *McKisson v. Sales Affiliates, Inc.*, 416 S.W. 2d 787 (Tex. 1967). In fact, in the very recent case of *Rourke v. Garza*, 511 S.W. 2d 331 (Tex.Civ.App. — Houston, 1974), Application for Writ of Error granted ot'r gr'ds, 18 Tex.Sup.Ct.Jour. 169 (1975), The Texas Supreme Court held in fact that a sale is not necessary at all.

In *McKisson v. Sales Affiliates, Inc., supra*, a hair preparation distributor left a sample with a beauty shop owner. Nothing was paid for the product. The beauty shop owner used the product on herself result-

ing in the loss of her hair. The Texas Supreme Court held that this transaction was sufficient "sale" to permit the visitation of liability under Sec. 402 A of the *Restatement of Torts 2d.*

The *McKisson Case* was then followed by the case of *Malinak v. Firestone Tire and Rubber Co.*, 436 S.W. 2d 210 (Tex.Civ.App. — Houston (1st Dist.) 1969, n.r.e.). In that case a tire distributor arranged for Plaintiff to purchase tires from the Firestone Company. The tires were then brought back to the distributor where they were mounted. The record did not show a profit, if any, that might have been realized by the actual installer. The Court held that the transaction was essentially commercial in the character and that Sec. 402 A was applicable. The *Malinak Case* cites with approval the case of *Barth v. B. F. Goodrich Co.*, 265 A.C.A. 253, 71 Cal. Rptr. 306 (1968). In that case the California Court decided that the definition of a sale or of a seller for the purpose of the doctrine of strict liability differs with the general definition of sale or seller as applicable to the law of contracts. It specifically held that neither a transfer of title to the goods nor a sale was required. See also: Hill, "HOW STRICT IS STRICT?", 32 Tex. Bar Jour. (Nov. 1969) 759.

Respondents herein are clearly among the class of persons sought to be protected by 402 A since they are persons who are expected to and who in fact did use or consume the product manufactured or assembled. Neither Rule 402 A nor Texas Law requires that the user or consumer be a member of the general public or even a purchaser of the product. *Darryl v. Ford Motor Co.*, 440 S.W. 2d 630 (Tex. 1969); *Putman v. Erie*

Manufacturing Co., 338 F.2d 911 (5th Cir. 1964). Because the Texas Courts have taken the view that the words "sale", "seller" or "business of selling" are not to be interpreted in the strict sense as in a contract situation, whether or not Day and Zimmermann and the United States Government have a relationship of independent contractor is immaterial to the determination of this suit. The fact remains that Day and Zimmermann produced the product for profit to the ultimate consumer, the United States of America and its employees. This is the essentially commercial transaction that Rule 402 A seeks to cover.

This is further confirmed by Note F under Sec. 402 A, *supra*. That Note states in part that the Rule applied, "to any manufacturer of such a product . . .".

Furthermore, the Texas Supreme Court has recently held that the transaction between Day and Zimmermann, Inc., and the United States Government in fact involves the "sale" of goods from Day and Zimmermann, Inc., to the United States Government and that for some period of time, no matter how fleeting, Day and Zimmermann, Inc., had title to the component parts that ultimately make up the product sold to the government. *Day & Zimmermann, Inc. v. Calvert*, 519 S.W. 2d 106 (Tex., 1975) In that case the Texas Supreme Court held that Day & Zimmermann, Inc., did not have to pay sales tax because of certain exemptions in the Texas Sales Tax Law. In reaching that conclusion the Court found that the transfer of the component parts from the component parts manufacturer to Day & Zimmermann, Inc., involved a sale and the transfer of the completed product from Day & Zimmermann, Inc., to the United States Government constituted a sale.

At Page 110 that Court stated:

> "Title therefore appears to have vested in Day & Zimmermann after inspection and acceptance at the Lone Star Plant, although, as previously stated, the "sale" between Day & Zimmermann and its vendors took place when the good swere readied for shipment to the plant. With reference to the transfer of title from Day & Zimmermann to the Government, after the inspection and acceptance of the materials by Day & Zimmermann, they were labeled as property of the Federal Government . . . .".
>
> "In view of the distinct, identifiable transactions between Day & Zimmermann and its vendor and Day & Zimmermann and the Federal Government, it is clear that the initial purchases by Day & Zimmermann were not taxable under the 'Sale for Resale' exemption. Art. 20-04(0). Additionally, the second sale between Day & Zimmermann and the Federal Government is also exempt . . . .".

Petitioner places much emphasis on policy considerations and list what it considers to be seven policy arguments against the application of strict liability. It is noted, however, that Petitioner does not refer to the case of *Foster v. Day & Zimmermann, Inc.*, 502 F.2d 867 (8th Cir. 1974). The *Foster Case* is almost identical to the case at bar in that it involved the premature detonation of a defectively manufactured hand grenade causing severe injury to a serviceman.

In that case the 8th Circuit likewise reviews the policy considerations involved in the application of strict liability and found that such policy did in fact require the application of Sec. 402 A, *Restatement of Torts 2d.*

In that case the Court specifically stated at Page 871, as follows:

> "In making the grenade and its component parts the defendant knew that it was made for military personnel and that it was to be used by them. We believe the public interest in human life and health requires the protection of the law against the manufacture of defective explosives, whether they are to be used by members of the public at large or members of the public serving in our armed forces. It is true that the defendants herein did not solicit the use of their product *yet they most certainly did reap the profits from its production*. When these factors are considered together, the defendants' argument is unpersuasive." (Emphasis added)

It is considered that Petitioner's arguments are likewise unpersuasive.

CONCLUSION

Respondents pray that Petitioner's Application for Writ of Certiorari should be in all things denied and

that the judgment of the Court of Appeals of the 5th Circuit should remain as written.

Respectfully submitted,

Cahill Hitt
Hitt, Pesek & Lovett
2605 Texas Boulevard
P. O. Box 18
Texarkana, Texas 75501

LAW OFFICES OF
JERRY H. SUMMERS, P.C.
500 Lindsay Street
Chattanooga, Tennessee 37403

ATTORNEYS FOR
RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that on this the ___ day of September, 1975, a true and correct copy of the above and foregoing brief for Respondent in Opposition to Petition for Writ of Certiorari was placed in the United States Mail, postage prepaid, to Mr. Norman C. Russell, P. O. Box 1049, Texarkana, Texas 75501, Attorney for Petitioner.

Cahill Hitt

APPENDIX A

CAMBODIA

MILITARY ASSISTANCE

Agreement effected by exchange of notes
Signed at Phnom Penh August 20, 1970;
Entered into force August 20, 1970.

The American Charge d'Affaires and interim to the Minister of Foreign Affairs of Cambodia

PHNOM PENH, August 20, 1970

EXCELLENCY:

I have the honor to refer to recent discussions with the Government of Cambodia concerning the conditions under which defense articles are being furnished to Cambodia. I propose that the following arrangements apply to the provision of these defense articles:

(1) All defense articles furnished to the Government of Cambodia shall be subject to the requirements of United States law and to the following conditions specified in numbered paragraphs 3, 4, 5, 6 and 7 of the Exchange of Notes of May 16, 1955,[1] at Phnom Penh between the Governments of the United States and Cambodia:

> Any military assistance furnished by the United States will be provided on the condition

1 TIAS 3240; 6 UST 996

that no equipment or materials furnished will be used to undertake acts of aggression against any nation.

The Government of Cambodia will utilize the equipment and materials furnished by the Government of the United States solely for the maintenance of its internal security and legitimate defense of its territory.

The Government of Cambodia will assure the safeguarding and the security of any article, service of technical military information furnished by the United States.

The title to or possession of any equipment, materials, information, or services furnished will not be transferred to any person not an officer or agent of the Government of Cambodia, or to a third country, without the prior consent of the competent American authorities.

If this equipment is no longer required for the purposes for which it was originally furnished as specified in paragraph 4 of the present Agreement, the Government of Cambodia will return it to the United States or dispose of it in accordance with the wishes of the Government of the United States.

(2) With regard to the use of these articles, the Government of Cambodia will permit such administrative observation and review as the United States Government may require and provide necessary information to the United States Govern-

ment. United States Government personnel discharging the responsibilities specified in this paragraph will operate as part of the Embassy of the United States of America under the direction and control of the Chief of the Diplomatic Mission and will have the same privileges and immunities as are accorded other personnel in comparable positions in the Embassy of the United States.

(3) These arrangements will apply to all United States military assistance heretofore furnished or which may hereafter be furnished to Cambodia by the United States, whether that assistance is received directly from the Government of the United States or transferred in any other manner to Cambodia.

(4) Cambodia or the United States may in writing request revision or give notice of termination of the present Agreement, which shall be effective upon receipt. In the event of termination the materials and equipment furnished by the United States will continue to be subject to the conditions specified in numbered paragraph 1 of this agreement, which conditions will remain in force until their revision or their termination by a new agreement.

If these terms are acceptable to the Government of Cambodia I have the honor to propose that this note and Your Excellency's note in reply concurring therein shall constitute an agreement between our two Governments, which shall enter into force on the date of your Excellency's reply.

Please accept, Excellency, the renewed assurances of my highest considerations.

Lloyd M. Rives
Charge d'Affaires, a.i.

HIS EXCELLENCY
KOUN WICK,
MINISTER OF FOREIGN AFFAIRS,
PHNOM PENH.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DORIS J. BURNS, as Administrix of the Goods, Chattels, and Credits which were of WENDELL M. BURNS, deceased, and DORIS J. BURNS, individually,

Plaintiff,

against 71 Civ. 3205

DAY & ZIMMERMANN, INC.,

Defendant.

New York, *July 14, 15, 16, 1975*

STENOGRAPHER'S MINUTES

Before:
HON. JOHN M. CANNELLA, D.J. and a Jury.

[2] (Case called.)

MR. BRUMBELOW:
If your Honor please, Mr. Cox couldn't come with me this time. He was tied up on another matter. However, I have brought with me one of our summer law clerks. He is in his third year at Penn, and he has done some research and is familiar with the case, and he is very good at carrying this big, heavy bag, and if your Honor would permit him to sit at counsel table, I would appreciate it.

THE COURT:
All right, fine. I guess there is no objection to that; is there, Mr. Block?

MR. BLOCK:
Of course not, Judge.

THE COURT:
What forum are you in now at this point.

MR. BLOCK:
On the choice of law, Judge?

THE COURT:
Yes.

MR. BLOCK:
I thought we had Texas law.

THE COURT:
You stipulated Texas law last time.

MR. BLOCK:
Yes, we had stipulated Texas law last time.

MR. BRUMBELOW:
Yes, your Honor, that is correct.

THE COURT:
The same here, is it?

MR. BRUMBELOW:
Yes.

MR. BLOCK:
It's not exactly the same here, . . .

* * * *

Supreme Court, U. S.
FILED
OCT 6 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-245

DAY & ZIMMERMANN, INC.,

Petitioner,

versus

HAWLEY K. CHALLONER, DAVID E. NELMS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DANIEL E. NELMS, AND MARY EDNA NELMS,

Respondents.

RESPONSE OF DAY & ZIMMERMANN, INC. PETITIONER, TO BRIEF OF RESPONDENTS OFFERED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Norman C. Russell
ATCHLEY, RUSSELL,
WALDROP & HLAVINKA
803 Spruce Street
P. O. Box 1049
Texarkana, Texas 75501
ATTORNEYS FOR PETITIONER

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 · 504/822-1611

TABLE OF CONTENTS

Page

RESPONSE TO RESPONDENTS' BRIEF ON THE CONFLICT OF LAWS QUESTION 1

CONCLUSION 6

CERTIFICATE OF SERVICE 6

INDEX OF AUTHORITIES

Babcock vs. Johnson, 12 N.Y.2d 743, 119 N.E.2d 279, 240 N.Y.2d 743 (1963) 5

Couch vs. Mobil Oil Company, 327 F.Supp. 897, Southern District of Texas, 1971 5

Day & Zimmermann, Inc. vs. Calvert, 519 S.W.2d 106, Tex.Sup.Ct., 1975 2

Doss vs. Apache Powder, 430 F.2d 1317, 1321 3,4,5

Klaxon vs. Stentor, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941) 4,5

Marmon vs. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968) 3,5

Smith vs. General Motors Corporation, 382 F.Supp. 766 5

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-245

DAY & ZIMMERMANN, INC.,
Petitioner,

versus

HAWLEY K. CHALLONER, DAVID E. NELMS,
INDIVIDUALLY AND AS ADMINISTRATOR OF
THE ESTATE OF DANIEL E. NELMS, AND
MARY EDNA NELMS,
Respondents.

RESPONSE OF DAY & ZIMMERMANN, INC. PETITIONER, TO BRIEF OF RESPONDENTS OFFERED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONSE TO RESPONDENTS' BRIEF ON THE CONFLICT OF LAWS QUESTION

Respondents' brief (page 1) challenges the correctness of Petitioner's assertion that "There was no sale by Petitioner to the United States of any product, and it never had any right of ownership in the ammunition."

In its challenge of this statement, Respondents (page 2) assert that Day & Zimmermann, Inc. ". . . did sell the completed product to the United States Government." They say that such is a judicial fact by reason of *Day & Zimmermann, Inc. vs. Calvert*, 519 S.W.2d 106, Tex. Sup.Ct. 1975. This case is not authority for such position.

This litigation (now pending before the Supreme Court of the United States on Petition for Certiorari by "Bob Bullock, Comptroller of Public Accounts of the State of Texas") involved an assessment for sums allegedly due under the Texas Limited Sales, Excise and Use Tax Act. The stipulation of facts (No. 34 and 67) state that no tax was assessed upon component parts going into the finished ammunition product and that (No. 67) no tax was involved on ammunition and/or components produced by Day & Zimmermann, Inc. and delivered to the United States Government. The items subject to litigation in the tax controversy are described by the State of Texas in its Petition to this Court as follows:

> "The taxes were not levied on any of the component parts that went into the assembled ammunition and munitions received by the United States, but were imposed only on taxable supplies such as computer time and other equipment leased by Day and Zimmermann, stationery, toilet paper, pencils, other secretarial supplies, ice, light bulbs and charges for the printing and supplying of the plant newspaper for Day and Zimmermann employees."[1]

1 See pages 3-4 of Petition for Writ of Certiorari to the Supreme Court of Texas as filed by the State of Texas pending in the Supreme Court of the United States.

The Texas Supreme Court (p. 108) says the audit involved tangible personal property ". . . not including any of the component parts that went into the finished product, purchased and consumed by the operating contractor in its performance with the Federal Government."

Hence the case cited has not reduced to a judicial certainty the fact that the finished ammunition products were "sold" to the Government. Day and Zimmermann's assertion in its Petition that there was no sale was, and is, a correct statement.

Respondents (beginning p. 2 of Brief) say there has been an evolution in the past on choice of law rules and hence the Texas Supreme Court *could*, and in light of cited cases, "probably would, refuse to follow the lex loci delecti rule in a case like the present one, ..." Respondents' brief (p. 6) says the Court of Appeals adopted the correct choice of law rule and ". . . the one the Texas Supreme Court probably would have adopted, ..." This is but prophecy on the part of counsel as to what the Texas Supreme Court would do. It is not uncommon for the federal courts to predict the holding of a state court where that latter court has made no pronouncement. However this approach was used in the Fifth Circuit[2] wherein the parties there were attempting to get the Fifth Circuit to say that the Texas Supreme Court would, at the time of *Doss*, have changed its decision had it been confronted with the factual situation presented in *Marmon vs. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. 1968). The Fifth Circuit says that such an approach ". . . ignores the prin-

2 *Doss vs. Apache Powder*, 430 F.2d 1317, 1321.

cipal of stare decisis, disregards the fact that many jurisdictions have chosen to retain the traditional rules when litigants urged that such rules be discarded and asked the federal courts to second guess the highest court of a state as to matters of state law." The Court of Appeals (Fifth Circuit) in *Doss* observed "In this diversity action, we are bound to apply the law of Texas, including its conflict of law rules. *Klaxon vs. Stentor*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941)."

The Fifth Circuit in *Doss* not only refused to follow the approach suggested in *Challoner*, but it adhered to the rule of stare decisis and did not there depart from the Texas law. The Court of Appeals in *Challoner* was not so bound as it was in *Doss* as it was willing to follow Texas law on strict liability but did depart on conflicts and apply its own rule.

Respondents assert (p. 8 of Brief) that Petitioner, Day & Zimmermann, Inc. is acting inconsistently and in bad faith by contending that Cambodian law should apply. This contention is because of a stipulation by Day & Zimmermann, Inc. in the trial of a cause (*Burns vs. Day & Zimmermann, Inc.*) pending in the Southern District of New York wherein it was stipulated that the Texas law was applicable. As evidence of such stipulation, Respondents' attach as Appendix B a part from the record of that cause. No inconsistency exists in the position in the New York case and the Texas case now before this Court. The New York case was a bifurcated trial and the stipulation came about in the trial on the damages issues — not the liability question. Further, New York follows the "most significant

contacts" theory of conflicts[3] and not the Texas lex loci delicti theory. Hence, to seek application of Vietnamese law in the New York trial would have been inappropriate as Vietnamese law would have application.

Petitioner's principal support in its response to Day & Zimmermann's Petition to apply Texas law is founded upon *Couch vs. Mobil Oil Company*, 327 F.Supp. 897, Southern District of Texas, 1971. There the District Court did follow the interest analysis rule. This case has never been cited as authority by any subsequent case. The Court for the Northern District of Texas subsequent to *Couch* in *Mark Smith vs. General Motors Corporation*, 382 F.Supp. 766, when dealing with a claim arising in the Republic of Mexico, and after pointing out that the wrongful death statute of Texas had no extraterritorial application, then followed the Texas Supreme Court rule of *Marmon vs. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. 1968). The District Court in *Smith vs. General Motors* followed the Fifth Circuit's holding in *Doss*, but the Fifth Circuit in *Challoner* was unwilling to follow its precedent fixed in the *Doss* case. *Challoner vs. Day & Zimmermann* points up the inconsistency of the Fifth Circuit in its failure to follow the basic rules of *Erie* and *Klaxon* and also in failing to adhere to its earlier pronouncements in *Doss*. Nothing can be said for the District Court's holding in *Couch* except that it reflects that Court's findings on conflicts and shows that it is wholly inconsistent with pronouncements of the Supreme Court of the United States and of the Supreme Court of Texas and other District Courts of Texas.

---

3 *Babcock vs. Johnson*, 12 N.Y.2d 473, 119 N.E.2d 279, 240 N.Y.2d 743 (1963).

CONCLUSION

Petitioner prays that its application for certiorari be granted.

ATCHLEY, RUSSELL,
WALDROP & HLAVINKA
803 Spruce Street
P. O. Box 1049
Texarkana, Texas 75501

Norman C. Russell

ATTORNEYS FOR
PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Response of Day & Zimmermann, Inc., Petitioner, to Brief of Respondents offered in opposition to Petition for Writ of Certiorari has been mailed to Mr. Cahill Hitt, Hitt, Pesek & Lovett, P. O. Box 18, Texarkana, Texas 75501, Attorney for Respondents, on this the ____ day of October, 1975.

Norman C. Russell